IN THE UNITED STATES DISTRIC COURT
FOR THE DISTRICT OF MARYLAND

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC	*	
	*	
Plaintiff	*	CIVIL NO.: 1:21-cv-02083-JKB
v.	*	
SHORE TRANSIT, et al.	*	
	*	
Defendants	*	

* * * * * * * * * * * * * *

DEFENDANTS' MOTION TO DISMISS

DEFENDANTS SHORE TRANSIT, BRAD BELLACICCO and TRI-COUNTY COUNCIL OF THE LOWER EASTERN SHORE OF MARYLAND, by KARPINSKI, CORNBROOKS & KARP, P.A. and KEVIN KARPINSKI, its attorneys, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, move this Court to enter dismissal in their favor on Plaintiff's Complaint for failure to state a claim upon which relief can be granted, based on the grounds which are more fully set forth in the accompanying memorandum filed herewith.

Respectfully submitted,

KARPINSKI, CORNBROOKS & KARP, P.A.

BY: /s/ Kevin Karpinski

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September 2021, the foregoing was electronically filed, with notice to:

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* * * * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

DEFENDANTS SHORE TRANSIT, BRAD BELLACICCO and TRI-COUNTY COUNCIL OF THE LOWER EASTERN SHORE OF MARYLAND (hereinafter referred to as the "Council" and collectively referred to as "Shore Transit"), by KARPINSKI, CORNBROOKS & KARP, P.A. and KEVIN KARPINSKI, its attorneys, hereby submit the instant Memorandum in Support of Defendants' Motion to Dismiss, filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and further state:

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INTRODUCTION

Plaintiff, People for the Ethical Treatment of Animals, Inc. ("PETA" or "Plaintiff"), challenges the constitutionality of two provisions of Shore Transit's advertising policy,[1] under which Shore Transit prohibits the placement of political advertisements on its vehicles and Shore Transit reserves the right to reject any advertisements that are determined "to be controversial, offensive, objectionable or in poor taste." ECF 7-11 at pp. 16, 18. In rejecting PETA's request to place two advertisements on Shore Transit's vehicles, Shore Transit indicated that the proposed advertisements were "too offensive for [its] market and political in nature." ECF 7-5 at pp. 2.

STATEMENT OF FACTS

Below, Defendant summarizes the facts alleged in the Complaint without conceding the veracity of the allegations contained therein.

In May of 2020, PETA, in an email correspondence to Shore Transit, expressed its desire to place two advertisements on Shore Transit's vehicles "that service Salisbury, MD for 4-weeks beginning ASAP." ECF 7-3 at pp. 2; Complaint at ¶ 1, 31. PETA inquired as to whether the two advertisements would be approved. ECF 7-3 at pp. 2. The two advertisements that PETA requested to place on Shore Transit's vehicles both contained the phrase "NO ONE NEEDS TO KILL

[1] Shore Transit's "policies" concerning advertisements are actually not "policies" within the traditional sense of the word. Instead, the "policies" are provisions contained within Shore Transit's advertising contract with Vector Media Transit, LLC ("Vector"). However, for purposes of consistency, the provisions of that contract will be referred to as "policies" within this Memorandum.

TO EAT. Close the slaughterhouses: Save the workers, their families and the animals." ECF 7-10, at pp. 2–3; Complaint at ¶ 31. In one of the advertisements, the word "KILL" is superimposed on a bloody cleaver. Complaint at ¶ 31. Whereas, in the other, the message is adjacent to a depiction of a child holding a chicken. *Id.*

In response to PETA's request to advertise on Shore Transit's vehicles, the regional manager of Vector, Mark Sheely, responded to PETA's request and provided a response on behalf of Shore Transit: "After considerable consideration, we will decline the PETA ads. We find them too offensive for our market and political in nature." Complaint at ¶ 33. On June 10, 2020, PETA sent a letter to Shore Transit concerning Shore Transit's denial of PETA's proposed advertisements. *See generally* ECF 7-4; Complaint at ¶ 34. In said correspondence, PETA acknowledged that the advertising space on Shore Transit's vehicles constitutes a nonpublic forum, yet PETA alleged that Shore Transit's ban on political and offensive advertisements was unconstitutional. ECF 7-4 at pp. 2–3. In that same correspondence, PETA also requested that Shore Transit reverse its decision denying PETA the opportunity to run advertisements on Shore Transit's vehicles and requested a response by June 17, 2020. ECF 7-4 at pp. 3; Complaint at ¶ 34.

Subsequent to the denial of its request to advertise, PETA made a request under the Maryland Public Information Act ("PIA") to Shore Transit. *See* ECF 7-8; Complaint at ¶ 21. In that request, PETA sought records relating to Shore Transit's denial of PETA's request to advertise, records concerning all

advertisements approved or rejected by Shore Transit within the last three years, "all documents concerning Shore Transit's reasons for approving, not approving or requesting modifications to advertisements submitted for Shore Transit's system, including any communication with entities that submitted advertisements for approval[,]" and records demonstrating the amount of revenue generated by Shore Transit's advertising program. ECF 7-8 at pp. 2–3; *see also* Complaint at ¶ 21. In response to PETA's PIA request, Shore Transit supplied PETA with copies of meeting minutes, relevant emails, a copy of its contract with Vector, *see supra* at n.1, a copy of the Maryland Transit Administration's "Locally Operated Transit System Program Manual[,]" and spreadsheets setting forth the amount of revenue Shore Transit has generated in selling advertising space on its buses. *See generally* ECF 7-10–7-13; Complaint at ¶ 22.

The contract between Shore Transit and Vector sets forth the objective of the contract and indicates that its purpose "is to obtain effective marketing and advertising services that will produce the maximum revenue possible for [Shore Transit.]" ECF 7-11 at pp. 17. The contract also provides that Shore Transit is entitled to reject certain types of advertisements. Specifically, under Section 1.2 of the contract, "Shore Transit, operating on behalf of the Region reserves the right to reject any advertising that it determines to be controversial, offensive, objectionable or in poor taste." ECF 7-11 at pp. 17. Shore Transit's contract with Vector also expressly provides that "[p]olitical advertisements will not be accepted." ECF 7-11 at pp. 19; Complaint at ¶ 24. Additionally, the contract

indicates that up to five percent of Shore Transit's vehicles will be free from any paid advertising and that those vehicles may be used to display public service announcements. ECF 7-11 at pp. 19.

After receiving materials responsive to its PIA request, on July 22, 2020, PETA contacted Ms. Sheely seeking to renew its request to run the two advertisements on Shore Transit's vehicles. ECF 7-5 at pp. 2; Complaint at ¶ 4. Shore Transit did not respond to PETA's renewed request to advertise on its vehicles. *See* Complaint at ¶ 4. On August 17, 2021, PETA filed a two-count Complaint (the "Complaint") with this Court, alleging that, Shore Transit's denial of PETA's request to advertise violated the First and Fourteenth Amendments. In the Complaint, PETA launched facial and as applied challenges to the provision of Shore Transit's contract with Vector, which indicates that Shore Transit will not accept political advertisements and provides Shore Transit with the right to reject advertisements deemed "offensive," "controversial," "objectionable," or "in poor taste[.]" Complaint at ¶ 44–49. In particular, PETA alleges that those provisions are unconstitutional because they, (1) "constitute impermissible content-based restrictions on speech in a designated public forum[;]" (2) "are incapable of reasoned application[;]" (3) "afford unfettered discretion to enforcement officials[;]" (4) constitute viewpoint discrimination; (5) are substantially overbroad; and (6) are unconstitutionally vague. *See* Complaint at ¶ 43–47. Along with the Complaint, PETA also filed a Motion seeking a preliminary injunction ("Plaintiff's Motion" or the "Motion").

The Structure of the Council

The Council is a governmental entity, established under Maryland Code, Economic Development ("ED") § 13-802. Shore Transit is a division of the Council, which operates transit services for the regions that the Council represents, *i.e.*, Somerset, Worcester and Wicomico Counties (the "Region"). See ED § 13-801(b). The Council is a "cooperative planning and development unit for" Somerset, Worcester and Wicomico Counties, created with the purposes of, (1) "foster[ing] the physical, economic and social development of the region; and" (2) "use effectively the assistance provided to the region by the State." ED § 13-802(c)(2)(i)–(ii). Furthermore, the Council is tasked with "initiat[ing] and coordinat[ing] plans and projects for the development of human and economic resources of the region as a planning and development unit for the Lower Eastern Shore." ED § 13-802(c)(3).

STANDARD OF LAW

The purpose of a motion to dismiss made pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint. *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006). A plaintiff's Complaint need only satisfy the standard of Rule 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 n.3, 127 S.Ct. 1955, 1965 n.3 (2007). That showing must consist of more than "a formulaic recitation of the elements of a cause of action" or "naked assertion[s] devoid of further factual

enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 677, 129 S.Ct. 1937, 1948 (2009) (internal citations omitted).

At this stage, the Court must consider all well-pleaded allegations in a complaint as true, *Albright v. Oliver*, 510 U.S. 266, 268, 114 S.Ct. 807, 810 (1994), and must construe all factual allegations in the light most favorable to the plaintiff. *See Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783 (4th Cir. 1999) (citing *Myland Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)). In evaluating the complaint, the Court need not accept unsupported legal allegations. *Revene v. Charles Cty. Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989). Nor must it agree with the legal conclusions couched as factual allegations, *Iqbal*, 556 U.S. at 678–79, 129 S.Ct. at 1949–50, or conclusory factual allegations devoid of any reference to actual events. *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979); *see also Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged, but it has not 'show[n] . . . that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679, 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)). Thus, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

A complaint need not assert "detailed factual allegations," but it must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1964

(citations omitted). Thus, the "[f]actual allegations must be enough to raise a right to relief above the speculative level," *id.* (internal citation omitted), to one that is "plausible on its face," *id.* at 570, 127 S.Ct. at 1974 rather than merely "conceivable[.]" *Id.* In considering such a motion, a plaintiff's well-pleaded allegations are taken as true and the complaint is viewed in the light most favorable to the plaintiff. *Wikimedia Found. V. Nat'l Sec. Agency*, 857 F.3d 193, 208 (4th Cir. 2017). Legal conclusions enjoy no such deference. *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949.

ARGUMENT

I. THE COUNCIL IS PROHIBITED FROM ACCEPTING PETA'S ADVERTISEMENTS BASED ON ITS STATUTORILY DEFINED PURPOSE.

The relevant provisions of the Economic Development Article of the Maryland Code make clear the underlying purpose that the Council—and therefore Shore Transit—are intended to serve is to "foster the physical, economic and social development of the region[.]" ED § 13-802(c)(2)(i). Accepting and placing PETA's proposed advertisements in the advertising space inside Shore Transit's vehicles would clearly conflict with the purposes the Council—and therefore Shore Transit—serve as determined by Maryland's General Assembly and codified within ED § 13-802(c)(2)(i). Specifically, both of PETA's proposed advertisements contain the following phrase: "Close the slaughterhouses: Save the workers, their families and the animals." ECF 7-10, at pp. 2–3; Complaint at ¶ 31. As evidenced by the language contained within PETA's advertisements, PETA's advertisements incontrovertibly suggest that

businesses within the Region, which Shore-Transit and the Council serve, should be closed. If Shore Transit were to accept PETA's proposed advertisements and place them on its vehicles, Shore Transit would be acting in a manner that contravenes its statutorily defined purposes of fostering the "economic . . . development of the region." ED § 13-802(c)(2)(i).

Furthermore, regardless of any viewpoint expressed in PETA's proposed advertisement, Shore Transit's ability to generally accept and place advertisements on its vehicles is expressly limited by the purposes the Council is intended to serve, as determined by the General Assembly. In other words, ED § 13-802(c) clearly prohibits Shore Transit from placing advertisements on its vehicles that suggest businesses within the region should be closed. Including such advertisements on Shore Transit's vehicles would conflict with the Council's statutorily defined purposes as a cooperative planning and development unit for the Region and would likely jeopardize the funding Shore Transit receives from the State of Maryland. In short, ED § 13-802(c)(2)(i) requires Shore Transit to foster the economic development of the Region and acceptance of PETA's advertisements would contravene the statutory purposes underlying the Council's creation. Therefore, PETA's claims should be dismissed, because Shore Transit has no discretion to approve and place PETA's advertisements on its vehicles, in consideration of the purposes the Council serves.

II. THE ADVERTISING SPACE ON SHORE TRANSIT'S VEHICLES CONSTITUTES A NONPUBLIC FORUM.

As a bedrock principle of First Amendment jurisprudence, this Court must "identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797, 105 S.Ct. 3439, 3446 (1985). Generally, there exist three types of potential forums, which are subject to differing levels of constitutional scrutiny: "[T]he traditional public forum, the designated public forum and the non-public forum." *Warren v. Fairfax Cty.*, 196 F.3d 186, 191 (4th Cir. 1999) (citing *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 676–77, 118 S.Ct. 1633, 1641 (1998)). The distinction between these types of forums is based on several factors, including "the physical characteristics of the property, including its location, the objective use and purposes of the property, and the government intent and policy with respect to the property, which may be evidenced by its historic and traditional treatment." *Id.* at 191 (citations omitted).

Governmental property that has traditionally served as a medium of expressive conduct constitutes a traditional public forum. *International Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678, 112 S.Ct. 2701, 2705 (1992). Whereas, a designated public forum is a non-traditional public forum which a governmental entity "has opened for expressive activity by part or all of the public." *Id.* The remaining types of governmental properties, not encompassed within the definitions of traditional public or designated public fora

are generally considered nonpublic fora. *Forbes*, 523 U.S. at 677, 118 S.Ct. at 1641.

The test applicable to governmental regulation of speech in those types of fora depends upon the type of fora in question. For traditional public fora, governmental restrictions on speech are permissible "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id.* When a governmental entity restricts access to designated public fora, by an individual or entity within a class generally entitled to utilize such fora, strict scrutiny applies. *Id.* In contrast, where a governmental entity limits speech within the context of a nonpublic forum, a less exacting standard applies. In particular, "[w]here a statute or regulation limits speech in a nonpublic forum, '[i]t must be reasonable and 'not an effort to suppress expression merely because public officials oppose the speaker's view.'" *U.S. v. Kokinda*, 497 U.S. 720, 730, 110 S.Ct. 3115, 3121 (1990) (alterations in original) (quoting *Perry v. Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 955 (1983)).

The advertising space on Shore Transit's buses clearly constitutes a nonpublic forum. Courts have generally held that advertising space contained on buses operated by governmental entities are nonpublic fora. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 304, 94 S.Ct. 2714, 2718 (1974); *see also Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 978 F.3d 481, 485 (6th Cir. 2020) (concluding that advertising spaces on Michigan's Suburban Mobility Authority for Regional Transportation's buses constituted a

nonpublic forum); *Archdiocese of Washington v. Washington Metro. Area Transit Auth.*, 897 F.3d 314, 323 (D.C. Cir. 2018) (identifying advertising space on Washington Metro Area Transit Authority's buses as a nonpublic forum); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 218, 135 S.Ct. 2239, 2252 (2015) (identifying *Lehman* as a case involving a nonpublic forum); *Am. Freedom Def. Initiative v. King County*, 796 F.3d 1165, 1170 (9th Cir. 2015) (holding that advertising space on a bus constituted a nonpublic forum); *Am. Freedom Def. Initiative v. Massachusetts Bay Transp. Auth.*, 781 F.3d 571, 579–80 (1st Cir. 2015).

The only situations in which public buses have been held to constitute public fora are those in which governmental entities have permitted controversial advertisements, failed to adopt or implement a policy concerning restrictions to advertising space or have applied such policies in a laissez-faire manner. *See Am. Freedom Def. Initiative*, 781 F.3d at 580; *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 354 (6th Cir. 1998). PETA makes no such allegations within the Complaint or its Motion. Accordingly, the overwhelming weight of authority clearly suggests that the advertising space on Shore Transit's vehicles constitutes a nonpublic forum. Moreover, in a prior correspondence to Shore Transit, PETA acknowledged that "advertising space on public transit systems is a 'nonpublic forum' under the First Amendment." *See* ECF 7-4 at pp. 2. Therefore, Shore Transit must only demonstrate that its policies are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Child*

Evangelism Fellowship of Md, Inc. v. Montgomery Cty. Pub. Sch., 457 F.3d 376, 381 (4th Cir. 2006) (quoting *Perry*, 460 U.S. at 46, 103 S.Ct. at 955).

Because the advertising space inside Shore Transit's vehicles constitutes a unique nonpublic forum, *see James v. Washington Metro. Area Transit Auth.*, 649 F. Supp. 2d 424, 428 (D. Md. 2009), Shore Transit is not prohibited from denying requests to advertise based on the contents of proposed advertisements. *See Mansky*, 138 S.Ct. at 1885–86, 201 L.Ed.2d 201 (observing that "our decisions have long recognized that the government may impose some content-based restrictions on speech in non-public forums, including restrictions that exclude political advocates and forms of political advocacy." (citing *Greer v. Spock*, 424 U.S. 828, 813–33, 838–39, 96 S. Ct. 1211, 1214–15, 1217–18 (1976) and *Lehman*, 418 U.S. at 303–04, 94 S.Ct. at 2717–18)). Therefore, to the extent that PETA contends that Shore Transit's denial of its request to advertise was unconstitutional, because Shore Transit's policies constitute content-based restrictions, *see* Complaint at ¶ 43, this argument is unavailing.

III. SHORE TRANSIT'S PROHIBITION OF POLITICAL ADVERTISEMENTS IS CONSTITUTIONAL.

Overall, Shore Transit's policy of prohibiting political advertisements on the vehicles that it operates is constitutional, based on the character of the nonpublic forum in question, the purpose underlying that forum and Shore Transit's operations, and the captive nature of audiences involved therein.

a. Shore Transit's Policy is Constitutionally Permissible under *Lehman* and *Lebron*.

In *Lehman*, the City of Shaker Heights ("Shaker Heights") operated a transit system and its vehicles contained advertising spaces. *See Lehman*, 418 U.S. at 299–300, 94 S.Ct. 2714 at 2215. Under a contract with an advertising agency responsible for the implementation and administration of said advertising space, Shaker Heights set forth the following policy regarding the types of ads that may be permitted on its vehicles: "The CONTRACTOR shall not place political advertising in or upon any of the said CARS or in, upon or about any other additional and further space granted hereunder." *Id.* An individual who was running for state office applied for advertising space on Shaker Heights' vehicles, seeking to advertise his candidacy. *Id.* at 299-300, 94 S.Ct. at 2215–16. Shaker Heights denied the candidate's application for advertising space pursuant to its policy prohibiting political advertisements. *Id.* at 300, 94 S.Ct. at 2716.

The Court determined that the advertising space was a nonpublic forum, and that Shaker Height's prohibition of political advertisements was constitutional. *Id.* at 304, 94 S.Ct. at 2718 ("The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity."). In rejecting arguments that Shaker Height's advertising policy was unconstitutional, the Court recognized that advertising on public

transit vehicles is inherently unique, based on the captive nature of their audience. *Id.* at 302, 94 S.Ct. at 2717 (indicating that, unlike other advertising media, "viewers of billboards and streetcar signs had no 'choice or volition' to observe such advertising and had the message 'thrust upon them by all the arts and devices that skill can produce . . . The radio can be turned off, but not so the billboard or street car placard 'The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice.'" (citations omitted) (alterations in original) (citing *Packer Corp. v. Utah*, 285 U.S. 105, 110, 52 S.Ct. 273, 274 (1932))).

Like Shaker Heights' prohibition against political advertisements at issue in *Lehman*, Shore Transit's similar prohibition is constitutional. Based on the unique context of the nonpublic forum in question, *i.e.*, advertising space in public transit vehicles, Shore Transit may permissibly deny requests to place political advertisements in the vehicles that it operates. Furthermore, Shore Transit's "managerial decision to limit card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment Violation." *Lehman*, 418 U.S. at 304, 94 S.Ct. at 2718.

The Second Circuit Court of Appeals has confirmed *Lehman*'s broad application. *See Lebron v. Nat'l Passenger Corp. (Amtrack)*, 69 F.3d 650, 657 n.3 (2nd Cir. 1995) (indicating that "the Supreme Court has repeatedly reaffirmed a broader reading of *Lehman*[.]"). In subsequent applications of *Lehman*, courts have recognized the importance of a governmental entity's historical practice of

accepting only certain types of advertisements.[2] *See id.* at 660 (upholding Amtrack's prohibition of political advertisements on a billboard in New York's Penn Station as constitutional, where Amtrack "has never opened the [forum] for anything except purely commercial advertising"). Specifically, in *Lebron*, the Court recognized that where a governmental entity maintains a proprietary interest in operating a particular forum, a policy prohibiting the display of political advertisements is reasonable. *Id.* at 658 ("Amtrack's decision, as a proprietor, to decline to enter the political arena, even indirectly, by displaying political advertisements is certainly reasonable. Amtrack's position as a government controlled and financed public facility, used daily by thousands of people, made it highly advisable to avoid the criticism and the embarrassments of allowing any display seeming to favor any political view."). The Second Circuit found this to be true, even though Amtrack failed to maintain a written policy with regard to its prohibition of political advertisements in that case. *See id.* at 656.

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[2] Upon a petition for rehearing, which the Court denied, the *Lebron* Court made some minor corrections to its earlier opinion. *See Lebron v. national R.R. Passenger Corp. (Amtrack)*, 89 F.3d 39 (2nd Cir. 1995). Therein, the Court also noted that Amtrack had previously accepted advertisements which appear to be political in character, including "advertisements by New York Department of the Environment, New York Department of Commerce, a foundation for muscular dystrophy, and Plain Truth magazine; and public service advertisements concerning subjects such as the homeless, the environment, drunk driving, AIDS awareness, health issues and race relations[.]" *Id.* at 40. The Court observed, however, that "Amtrack is probably entitled to consider such advertisements as 'public service announcements' within the meaning of its standard licensing agreement." *Id.* The same is true of Shore Transit, even though PETA does not allege that Shore Transit has previously accepted or permitted any political advertisements to be placed in its vehicles. *See supra* at pp. 9–10.

The Second Circuit's decision in *Lebron* clearly suggests that Shore Transit's ban on political advertisements is not violative of PETA's First Amendment rights. Like Amtrack in *Lebron*, Shore Transit—as a division of the Council—is subject to governmental control, funding, and maintains a proprietary interest in placing advertisements on its vehicles, which evidences the reasonableness of Shore Transit's policy. *See id.* at 658. Unlike Amtrack, however, Shore Transit maintains a written policy that clearly indicates that Shore Transit will not accept political advertisements. In short, the guidance set forth in *Lebron* compels the conclusion that Shore Transit's policy of prohibiting political advertisements is constitutional. This is equally true based on the captive character of the audiences that Shore Transit serves under *Lehman*. *See* 418 U.S. at 299–300, 94 S.Ct. 2714 at 2215 (concluding that the captive nature of the audience, *i.e.*, public transit passengers, was relevant in determining the constitutional permissibility of a ban on political advertisements).

b. Shore Transit's Policy of Prohibiting Political Advertisements is Permissible under *Mansky*.

PETA relies—at length—on the Supreme Court's decision in *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1889–90, 201 L. Ed. 2d 201 (2018) in arguing that Shore Transit's policy violates "the First Amendment's baseline reasonableness requirement[.]" Plaintiff's Motion at pp. 11. In *Mansky*, the Supreme Court held that Minnesota's policy of prohibiting political apparel was unconstitutional, because it was not "capable of reasoned application." *Mansky*, 138 S.Ct. at 1892, 201 L. Ed. 2d 201. Minnesota's political apparel ban provided

that "a political badge, political button or other political insignia may not be worn at or about the polling place." *Id.* at 1883, 201 L. Ed. 2d 201. First, the Court determined that the polling places constituted a nonpublic forum. *Id.* at 1886, 201 L. Ed. 2d 201. The Court noted that, although such policies need not be narrowly tailored, they are subject to a reasonableness requirement: "[T]he State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out." *Id.* at 1888, 201 L. Ed. 2d 201.

The Court held that, based on the State's subsequent guidance concerning its political apparel ban and the State's representations to the Court, the political apparel ban failed to comport with the reasonableness requirement. *Id.* ("Here, the unmoored use of the term 'political' in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this forgiving test"). In particular, the Court took issue with Minnesota's guidance concerning the political apparel ban, which specified that it prohibited "[i]ssue oriented material designed to influence or impact voting[.]" *Id.* at 1889, 201 L. Ed. 2d 201. At oral argument, the State took the position that this guidance would prohibit political apparel concerning "any subject on which a political candidate or party has taken a stance." *Id.*

The Court recognized that Minnesota's attempt at providing guidance resulted in a greater level of uncertainty as to what items the apparel ban applied to. *Id.* at 1889–90, 201 L. Ed. 2d 201. This essentially rendered the political apparel ban unworkable from a practical perspective. *Id.* (observing that "[a] rule

whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable" based on the litany of issues that may come before voters during an election).[3] Essentially, the Court did not hold that the provision in and of itself was incapable of reasoned application, only that the subsequent guidance provided by the State rendered the political apparel ban unreasonable. *Id.* In sum, the Court's holding in *Mansky* was premised upon the uncertainty over the types of apparel the ban prohibited, which—in turn—was based on Minnesota's subsequent guidance concerning the ban and the representations the State made to the Court. *Id.* at 1890–92.

First, unlike Minnesota in *Mansky*, Shore Transit has not promulgated regulations or other materials that would render its ban of political advertisements as incapable of reasoned application. Shore Transit's prohibition against political advertisements is relatively straightforward and prohibits the placement of political advertisements on its vehicles. Although PETA's advertisements do not specifically contain an endorsement of a political candidate, they clearly implicate a political agenda, in that they contain inherently political language. *See* Complaint at ¶ 31 (displaying the advertisements which contain the words "[c]lose the slaughterhouses: Save the

[3] The Court also recognized that Minnesota represented, during the course of the proceedings, that the political apparel ban only applied to "groups whose political positions are sufficiently 'well-known.'" *Id.* at 1890, 201 L. Ed. 2d 201. The Court commented that this "requirement, if anything, only increases the potential for erratic application." *Id.*

workers, their families and the animals"). The advertisements' references to closing slaughterhouses is political in nature, and Shore Transit appropriately rejected PETA's advertisements for this reason. Furthermore, "[p]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Mansky*, 138 S.Ct. at 1891, 201 L.Ed. 2d 201 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S.Ct. 2746, 2755 (1989)).

Second, in analyzing Minnesota's political apparel ban, the *Mansky* Court cited *Lehman* with approval and affirmed that "our decisions have long recognized that the government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy." *Id.* at 1885–86, 201 L. Ed. 2d 201. In other words, the Court's decision in no way abrogated the holding of *Lehman*, and *Lehman* still constitutes binding precedent. *See id.*

However, PETA's reliance on *Mansky* is misguided to the extent that the policy at issue in *Mansky* applied to a different forum, *i.e.*, polling places. *Mansky*, 138 S.Ct. at 1885, 201 L. Ed. 2d 201. Furthermore, *Mansky* is distinguishable, in that it concerned voters' rights to engage in political speech, within the context of the right to vote. *Id.* at 1892, 201 L. Ed. 2d 201 (commenting that "[c]ases like this 'present[ ] us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote." (quoting *Burson v. Freeman*, 504 U.S. 191, 198, 112 S.Ct. 1846, 1851 (1992)). To that extent, *Mansky* is distinguishable from the instant matter, and *Lehman* is analogous to a greater extent.

In sum, *Mansky* is distinguishable from the case *sub judice* for several reasons: (1) Shore Transit has not promulgated additional regulations or guidance which muddle its policies' application or their scope or render its policies incapable of reasoned application; (2) the interest implicated by the forum in question in *Mansky* was the right to vote, immediately distinguishable from the interest associated with Shore Transit's offering of public transit services; (3) there is no suggestion that Shore Transit's policy has been haphazardly applied or has the potential for such application; and (4) there are no allegations that Shore Transit has previously accepted political advertisements in contravention of its policy prohibiting them. Based on the foregoing, Shore Transit's policy of prohibiting political advertisements is constitutionally permissible, and PETA's claims—to the extent it challenges the application of Shore Transit's ban on political advertisements—should be dismissed.

IV. SHORE TRANSIT'S POLICIY PROHIBITING IT FROM PLACING ADVERTISEMENTS ON ITS VEHICLES THAT ARE OFFENSIVE OR OBJECTIONABLE IS CONSTITUTIONAL.

The contract with Vector Media Transit, LLC ("Vector"), the agency responsible for managing the advertising space on Shore Transit's vehicles, provides the following: "Shore Transit operating on behalf of the Region reserves the right to reject any advertising that it determines to be controversial, offensive, objectionable or in poor taste." ECF 7-11 at pp. 16. PETA alleges that this provision of Shore Transit's policy constitutes viewpoint discrimination, in violation of the First Amendment. Complaint at ¶ 46. This is not the case. There

is no indication that Shore Transit rejected PETA's ad on the basis of PETA's viewpoint expressed therein.

Generally, a governmental entity "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099, 1104 (D. Md. 1997) (quoting *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 2545 (1989)). However, in certain situations, courts have held that policies limiting First Amendment activity on the basis that the expression is "offensive" are constitutionally permissible.

In *Perry v. McDonald*, the Second Circuit Court of Appeals considered the constitutionality of a Vermont statute which prohibited license plates from containing materials that are considered "offensive or confusing to the general public." 280 F.3d 159, 163 (2nd Cir. 2001). In that case, the plaintiff requested a vanity license plate with the letters "SHTHPNS[.]" *Id.* at 163. Vermont initially issued the plates in error, but later revoked them upon becoming aware of the mistake. *Id.* The plaintiff then challenged the constitutionality of Vermont's policy regarding offensive license plates under the First Amendment. *Id.* The district court ruled in favor of Vermont, finding that the policy did not offend the First Amendment, and the plaintiff appealed the decision to the Second Circuit.

On appeal, the Court determined that the license plates constituted a nonpublic forum and therefore, that the restrictions on expressive activity conducted through license plates "need only be reasonable and viewpoint-neutral." *Id.* at 167. Through the proceedings, Vermont conceded that it did not

have a written policy further defining what constitutes material that it deems to be offensive but maintained "an unwritten policy of denying requests for plates bearing scatological terms." *Id.* at 167–68. The Court held that Vermont's prohibition of offensive license plates was reasonable and viewpoint neutral. *Id.* at 175. In reaching this conclusion, the Court recognized that, within the context of license plates, because they are property of the State, Vermont has a legitimate interest in limiting public perception that Vermont endorses the offensive terms contained therein. *Id.* at 169.[4]

The same rings true in this case. Shore Transit is a division of the Council, a governmental entity established by statute, *see* ED § 13-801, *et seq.*, and is a public transit agency for Somerset, Wicomico and Worcester Counties. PETA's advertisements contain no indication that the views expressed therein are not attributable to Shore Transit.[5] That being said, there is an overwhelming possibility that members of the public could interpret PETA's proposed advertisements as being endorsed by Shore Transit if they were placed on Shore

[4] In *Walker*, the Court suggested that the form of license plates was distinct from advertising spaces in public transit, as contemplated under *Lehman*. 576 U.S. at 218, 135 S.Ct. at 2252. However, the analysis is not as straightforward in this case, in consideration of the fact that, within the applicable contract, a portion of Shore Transit's vehicles contain no advertisements and may contain public service announcements. See ECF 7-11 at pp. 19; *see also supra* at n.2 (discussing the intersects between public service advertisements on public transport and policies banning political advertisements therein). Therefore, there exists a substantial risk that the public could view the advertisements on Shore Transit's vehicles as being endorsed by Shore Transit.

[5] Moreover, placing PETA's proposed advertisements on Shore Transit's vehicles would be inherently inconsistent with the statutorily defined purposes of the Council. *See* ED § 13-802(c)(2)(i); *see also supra* at pp. 9–10.

Transit's vehicles. As such, the risks identified by the Second Circuit in *Perry* are equally applicable in the instant case.

Second, as with Shore Transit's policy prohibiting political advertisements on its vehicles, whether Shore Transit's policy of prohibiting offensive advertisements is permissible under the First Amendment must be analyzed within the context of the forum in which it occurs. In *Lehman*, the Supreme Court noted the unique context of advertisements contained on or in public transport vehicles. *See Lehman*, 418 U.S. at 302, 94 S.Ct. at 2717. Therein, the Court indicated that "[t]he streetcar audience is a captive audience. It is there as a matter of necessity, not of choice. . . . In such situations, '[t]he legislature may recognize degrees of evil and adapt its legislation accordingly." *Id.* (citations omitted) (quoting *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 468, 72 S.Ct. 813, 823 (1952) (Douglas, J., dissenting)); *see also Packer Corp. v. Utah*, 285 U.S. 105, 110, 52 S.Ct. 273, 274–75 (1932)(indicating that, with regard to advertisements on public transit vehicles, they are "constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer . . . the radio can be turned off, but not so the billboard or street car placard"). The *Lehman* Court also indicated that "[t]hese situations are different from the traditional settings where First Amendment values inalterably prevail." *Lehman*, 418 U.S. at 302, 94 S.Ct. at 2717. The unique context of Shore Transit's advertising space compels the conclusion that Shore Transit's policies are constitutional.

Third, PETA's proposed advertisements are "offensive" as determined by Shore Transit. The advertisements both contain the use of the term "kill." One of the advertisements depicts a cleaver stained with blood. A reasonable mind would find that these words and depictions are, in fact, offensive. Furthermore, Shore Transit did not engage in viewpoint discrimination in denying PETA's advertisements. Instead, its denial was focused on the offensive aspects of the content of PETA's proposed advertisements, and not any viewpoint expressed therein. Moreover, accepting PETA's proposed advertisements would be inconsistent with the statutorily defined purposes of the Council. *See supra* at pp. 9–10.

Additionally, these advertisements are generally inconsistent with the types of advertisements that Shore Transit has previously approved to be placed on or in its vehicles. Like the City of Shaker Heights, Shore Transit's "managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation." *Lehman*, 418 U.S. at 304, 94 S.Ct. 2714 at 2718. Accordingly, PETA's arguments that Shore Transit's policies are unconstitutional are unavailing. The unique nature of the forum at issue, its associated purposes, and the intent of the General Assembly in creating the Council all clearly suggest that Shore Transit's denial of PETA's request to advertise were constitutionally permissible.

V. SHORE TRANSIT'S POLICIES ARE NOT UNCONSTITUTIONALLY VAGUE OR SUBSTANTIALLY OVERBROAD.

The vagueness doctrine is an "outgrowth . . . of the Due Process Clause of the Fifth Amendment." *U.S. v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 1845 (2008). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298 (1972). Generally, a statute or ordinance may be unconstitutionally vague, if it fails to provide a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.* at 108, 92 S.Ct. at 2298–2299. As indicated by Court of Appeals for the District of Columbia, however, "[i]t is not entirely clear that the vagueness doctrine applies to Guidelines, which do not, of course, impose criminal penalties on those whose advertisements are denied." *American Freedom Defense Initiative v. Washington Metropolitan Area Transit Authority*, 901 F.3d 356, 372 (D.C. Cir. 2018) (citing *Bryant v. Gates*, 532 F.3d 888, 892 (D.C. Cir. 2008)).

Indeed, the degree of vagueness that is permissible generally depends on "the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 1193 (1982). Where enactments proscribe criminal penalties, courts generally tolerate less vagueness when compared to enactments that contain only civil penalties. *Id.* at 498–99, 102 S.Ct. at 1193. In this case, the "enactments" PETA challenges are merely policies contained within Shore Transit's contract with Vector. *See* ECF 7-11 at pp. 17, 19. The policies do not carry any form of punishment. Instead, the only potential

consequence that could result through the application of said policies is that an advertisement will not be displayed within Shore Transit's vehicles. This is—in no way—comparable to a criminal or civil penalty, that has been associated with the enactments that Courts generally analyze for vagueness. Therefore, PETA's arguments concerning the policies' alleged deficiencies under the vagueness doctrine are unavailing, and PETA is unlikely to succeed on the merits of its related claim.

To the extent that this Court recognizes that "the overlap in analysis between unbridled discretion [*i.e.*, *Mansky*] and vagueness is clear; both doctrines require a court to determine whether a decisionmaker's exercise of discretion in allowing or disallowing speech is based upon objective and clear standards," *American Freedom Defense Initiative*, 901 F.3d at 372 (D.C. Cir. 2018), Shore Transit has addressed this in the section of this Memorandum concerning the analysis required under *Mansky*. *See supra*.

In addition to arguing that Shore Transit's policies are unconstitutionally vague, PETA also takes the position that Shore Transit's policies are overbroad. Under the overbreadth doctrine, an enactment may only be held unconstitutional in the event that it is "substantially overbroad." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14, 108 S.Ct. 2225, 2234 (1988). Generally, courts consider such laws or ordinances as substantially overbroad where they have the potential to limit "a substantial amount of constitutional activity." *U.S. v. Fentress*, 241 F. Supp.2d 526, 530 (2003). Because the overbreadth doctrine "is 'strong medicine[,]'" it has been employed "with

hesitation, and then only as a last resort." *Id.* (quoting *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32, 39, 120 S.Ct. 483, 488–89 (1999)).

The Supreme Court has held that "[t]he bare possibility of unconstitutional application is not enough; the law is unconstitutionally overbroad only if it reaches substantially beyond the permissible scope of legislative regulation." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 n.19, 104 S.Ct. 2118, 2126 n.19 (1984). The nature of the applicable forum is relevant to determining whether an enactment is overbroad and, where a nonpublic forum is involved, rational basis review applies, "which is the most deferential standard of review available under the First Amendment." *Fentress*, 241 F. Supp.2d at 531.

In addition, the Second Circuit has commented that the overbreadth doctrine "has only been applied to the conduct of the government in a role as a regulation, not as a proprietor."[6] *Lebron*, 69 F.3d at 659 (citing *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759–62, 108 S.Ct. 2138, 2145 (1988)). The *Lebron* Court indicated that the overbreadth doctrine is intended to protect "those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution[.]" *Id.* at 660. With respect to the

[6] The Second Circuit's analysis was in reference to a facial challenge launched against Amtrack's prohibition against political advertisements. *Lebron*, 69 F.3d at 659–60. Therefore, the principles set forth therein are applicable to the instant case to the extent PETA launches a facial challenge against any of Shore Transit's policies.

overbreadth challenge raised therein, the *Lebron* Court held that "[s]uch concerns simply are not implicated by Amtrak's role as the proprietor of Penn Station, essentially seeking to derive revenues from the sale of advertising while minimizing interference with or disruption of the station's commercial function." *Id.* at 660 (citing *Lehman*, 418 U.S. at 303, 94 S.Ct. at 2717).

The same holds true in this case. Shore Transit's policies concerning advertisements do not carry any threat of criminal prosecution, and their application therefore do not involve the chilling of any individual's or organization's First Amendment Rights. Instead, Shore Transit, as a division of the Council, is acting in a proprietary manner when managing the advertising spaces on its vehicles, and the concerns traditionally associated with the overbreadth doctrine are generally inapplicable given the context. Based on the purposes underlying the advertising space on Shore Transit's vehicles and its status as a nonpublic forum, this Court cannot conclude that Shore Transit's policies would limit a "substantial amount of constitutionally protected activity." *Id.* As set forth in the contract between Shore Transit and Vector, the purpose of the Shore Transit's advertising space is the generation of maximum revenues, within the context of offering public transport services. ECF 7-11 at pp. 17. Moreover, as a cooperative planning and development unit for the Region, the Council is required to act in a manner that is consistent with its statutorily defined purpose, *i.e.*, fostering the economic development of the region. ED § 13-802(c)(2)(i). Inclusion of PETA's advertisements on Shore Transit's vehicles

would be in direct conflict with the Council's statutorily enumerated purposes. *See id.*

Further, a party seeking to invalidate an enactment on grounds of overbreadth must "demonstrate from the text [of the enactment] and from actual fact that a substantial number of instances exist in which the [enactment] cannot be applied constitutionally." *New York State Club Ass'n*, 487 U.S. at 14, 108 S.Ct. at 2234. A failure to do so is fatal to a plaintiff's claim. *Id.* PETA has made no such showing here, especially in consideration of the fact that PETA represents that Shore Transit has only denied requests to advertise from PETA and one other applicant. *See* Complaint at ¶ 28. In short, there is little to no risk that Shore Transit's policies prohibit a substantial amount of constitutionally protected speech, based on the unique nature of the forum, its purpose, the Council's statutorily enumerated purposes as a planning and development unit for the Region, and the facts surrounding Shore Transit's denial of requests to advertise. Therefore, PETA's contentions that Shore Transit's policies are unconstitutional based on the vagueness or overbreadth doctrines are unavailing, and PETA's claims should be dismissed, for the reasons set forth above.

CONCLUSION

Based on the foregoing, this Court should dismiss PETA's claims. The challenged forum in this case is a non-public forum. Shore Transit is operating said forum in a proprietary capacity, and the individuals Shore Transit serves constitute a captive audience with respect to advertisements placed on Shore

Transit's vehicles. Shore Transit's policies are reasonable, capable of reasoned application, and must be viewed within the context forum involved herein, *i.e.*, advertising space on Shore Transit's vehicles. In addition, this Court must recognize the statutory purposes the Council was formed to pursue, as cooperative planning and development unit for the Region, *i.e.*, fostering economic development within the Region. Therefore, this Court should dismiss PETA's claims.

Respectfully submitted,

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BY: /s/ Kevin Karpinski

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September 2021, the foregoing was electronically filed, with notice to:

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IN THE UNITED STATES DISTRIC COURT
FOR THE DISTRICT OF MARYLAND

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.	*	
	*	
Plaintiff	*	CIVIL NO.: 1:21-cv-02083-JKB
v.	*	
SHORE TRANSIT, et al.	*	
Defendants	*	

* * * * * * * * * * * * * *

O R D E R

Upon consideration of Defendants Shore Transit, Brad Bellacicco and Tri-County Council of the Lower Eastern Shore of Maryland's (collectively, "Defendants") Motion to Dismiss and any response or reply thereto, it is this _____ day of _____, 20___

ORDERED:

1. Defendants' Motion **BE** and hereby is **GRANTED**; and

2. Defendants be and are hereby DISMISSED WITH PREJUDICE.

_____
Hon. James K. Bredar,
Chief District Judge,
U.S. District Court for
the District of Maryland